From: <MSerling@aol.com>
To: <MSC_clerk@courts.mi.gov>
Date: 12/31/03 3:27PM
Subject: Administrative File No. 2003-47

December 31, 2003

Corbin R. Davis, Clerk of the Court
Michigan Supreme Court
925 W. Ottawa
Lansing, MI 48915

Re: Administrative File No. 2003-47

Dear Mr. Davis:

I wanted to make sure that the court received the enclosed statement of Professor Erwin Chemerinsky of the University of Southern California Law School relative to the
Petition to Establish a Court Rule or Administrative Order to Create an Inactive Asbestos Docketing System.

I am also filing it electronically so that all parties interested in this issue will be able to view it on the Michigan Supreme Court web site.

Thank you for your attention to this matter.

Sincerely,

Michael B. Serling

MBS/sp
enclosures

MICHIGAN SUPREME COURT
Re: Administrative File No. 2003-47

Statement of Opposition to Petition to Establish a Court Rule or Administrative Order Creating Statewide Inactive Asbestos Docketing System

Erwin Chemerinsky
Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California

This statement is submitted in response to this Court's request for comments on the proposed rule to create a court rule or an administrative order establishing a statewide inactive asbestos docketing system. I submit this on my own, as a constitutional law professor who is very concerned about the implications of the proposed court rule. I have not received compensation from anyone in connection with preparing this statement. Nor have I ever received any compensation for work on asbestos

related cases. I have taught constitutional law for the past 24 years at laws schools including, U.S.C., UCLA, Duke, DePaul, and Loyola Los Angeles. Since 1983, I have been on the faculty at the University of Southern California. I have written extensively on constitutional law, including a leading treatise (Constitutional Law: Principles and Policies (2d ed. 2002) and over 100 law review articles.

I submit this comment because the proposed rule raises very troubling constitutional problems. First, the proposed rule to create a registry of inactive asbestos cases would violate basic principles of separation of powers. The Michigan Constitution, of course, expressly provides for separation of powers and states in Article I, 2, "The powers of government are divided into three branches, legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

One of the most basic principles of separation of powers is that only the Michigan legislature can exercise the legislative power and that this Court's rule-making power does not extend to changing the substantive law. As this Court recently expressed in McDougall v. Shanz, 461 Mich. 15, 27, 597 N.W.2d 148 (1999): "[I]t cannot be gainsaid that this Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law."

There is no doubt, however, that the proposed rule would be a major change in the substantive law. The registry of inactive asbestos cases is being created to limit the ability of individuals to sue until they have met certain requirements. The result would be that a significant group of people with asbestos-related conditions would be precluded from suing in Michigan courts. This is a substantive limit on the ability of individuals to sue for asbestos exposure and represents a policy choice that is for the legislature and not the judiciary. Indeed, the American Bar Association Commission on Asbestos, whose February 2003 report is the basis for the proposed rule, recommended legislative action; nothing in the report suggests that courts could accomplish such a substantive change in the law through the rule-making process. Adopting such a change by Court rule would be inconsistent with this Court's prior decisions which have held that "a litigant cannot be rule of court be deprived of a substantial right." Shannon v. Cross, 245 Mich. 220, 222-222, 222 N.W. 168 (1938).

Simply put, whether to create a registry of inactive asbestos cases, with limits on the ability of individuals to sue until they have a "physical impairment" (however that would be defined), is a policy question for the legislature under a system of separation of powers. The core feature of the proposed rule is limiting the ability of individuals to sue and that inherently is substantive, not procedural, and requires legislative action. As this Court recently expressed: "As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another." Van v. Zahorik, 460 Mich. 320, 327, 597 N.W.2d 15 (1999) (citations omitted).

Second, limiting the ability of individuals to sue inherently raises serious due process problems. A claim for recovery is a property interest under the due process and takings clauses. The Supreme Court has declared: "[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), held that terminating claims of possible

beneficiaries of a trust required notice and a hearing because the claims were property protected under the due process clause.

In Logan v. Zimmerman Brush Co., the Supreme Court said: "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." 455 U.S. at 429. In Logan, an employee claimed that he was terminated from his job because of a physical disability. He challenged his firing through the proper state administrative agency, but the agency negligently failed to hold a hearing within the statutorily prescribed time limit. The employer secured a dismissal of the plaintiff's claim with prejudice. The Court concluded that the dismissal denied the defendant a property interest without due process. Indeed, in Martinez v. California, 444 U.S. 277, 281-282 (1980), the Court accepted that "arguably" a state tort claim is a "species of 'property' protected by the due process clause." As the Court concluded in Logan: "As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." 455 U.S. at 433.

Lower courts, too, have recognized a property interest in claims for recovery of injuries. The Ninth Circuit, for example, has stated: "There is no question that claims for compensation are property interests that cannot be taken for public use without just compensation." In re Aircrash in Bali, Indonesia, 684 F.2d 1301, 1312 n.10 (9th Cir. 1980).

Closely related, there is a liberty interest -- even a fundamental right -- in access to the courts. The Supreme Court has spoken of "the fundamental constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817, 828 (1977). The Court long has said that the right to be heard in court is an essential aspect of due process. For example, in Windsor v. Mcveigh, in 1876, the Court spoke of the right to be heard as a principle which "lies at the foundation of all well-ordered systems of jurisprudence" and "founded in the first principles of natural justice." 93 U.S. 274, 277, 280 (1876). See also Hovey v. Elliot, 167 U.S. 409, 417 (1897).

Additionally, the Court has held that discrimination among people as to access to the courts is subjected to strict scrutiny under equal protection. The Court has quoted the Magna Charta, "To no one will we sell, to no one will we refuse, or delay, right or justice. . . . No free man shall be taken or imprisoned, or . . . upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land." Griffin v. Illinois, 351 U.S. 12, 16-17 (1956). The Court has said that "[i]n this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." Id. at 17.

In the civil context, the Court has declared: "[T]he Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures when such an action would be the equivalent of denying them an opportunity to be heard upon their claimed rights." Logan v. Zimmerman Brush Co., 455 U.S. at 429-30 (citations omitted).

The proposed rule has been advanced to limit the ability of a class of asbestos victims to sue until they meet a requirement of physical impairment. By depriving individuals of their ability to go to court, the proposed rule thus raises serious due process issues in terms of whether

it impermissibly deprives people of their liberty or property. For this reason, too, this Court should reject the proposed rule and leave the matter for careful consideration by the Michigan legislature.

Conclusion

Congress and state legislatures throughout the country are considering proposals for tort reform. Whatever the desirability of these proposals, it is a matter properly for the legislature and not the judiciary. Thus, I strongly urge this Court to reject the proposed rule to create a registry of inactive asbestos cases and all of the changes in the law attendant to it.

Respectfully submitted,

Erwin Chemerinsky
University of Southern
California Law School
699 Exposition Blvd.
Los Angeles, CA 90089-0071
(213) 740-2539